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No. 05-11287

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In The
Supreme Court of the United States

BRENT RAY BREWER,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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A. Respondent declines to defend the rationale of the state court's decision denying relief under *Penry v. Lynaugh*, 492 U.S. 302 (1989), but fails to explain how jurors could have concluded that the relevant mitigating qualities of Mr. Brewer's background of physical abuse and mental impairment supported a "no" answer to the future dangerousness issue.

In his opening brief, Mr. Brewer explained in detail why the categorical rejection of his *Penry* claim by the Texas Court of Criminal Appeals ("CCA") was objectively unreasonable in light of then-existing clearly established Federal law, and thus why it is appropriate for this Court to intervene and correct it under 28 U.S.C. § 2254(d). *See* Brief for Petitioner ("PB") 33-47. Respondent offers no competing explanation; he simply asserts, without more, that "[t]he state court's decision – that there was no reasonable likelihood [that Mr.] Brewer's mitigating evidence was outside the jury's effective reach in answering the special issues – is without question a reasonable application of *Jurek* and *Penry I*." Brief of Respondent ("RB") 42. Further, Respondent insists that he need not defend the CCA's reasoning to prevail under § 2254(d) because only "the state court's ultimate decision denying relief," and "not its reasoning," need be "tested for unreasonableness." RB 14; *see also* RB 43 (same).[1] Respondent

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[1] Respondent's reticence in embracing the CCA's reasoning is understandable. Respondent denies that the CCA, in overruling Mr. Brewer's *Penry* challenge, "employ[ed] a 'severity' or 'nexus' analysis. . . ." RB 44 (noting that "neither term appears" in the state court's opinion). But as we have amply demonstrated, *see* PB 36-41, the cases cited by the CCA to support its rejection of Mr. Brewer's *Penry* claim on direct appeal are firmly grounded in precisely the "nexus" and "severity" limitations this Court struck down in *Tennard v. Dretke*, 542 U.S.

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thus fails to offer any explanation of his own for how the state court could reasonably have found Mr. Brewer's mitigating evidence to have supported a "no" answer to the future dangerousness question, while pointedly refusing to defend the *ratio decidendi* by which the CCA actually *did* reject Mr. Brewer's *Penry* claim.[2] Respondent's argument

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274 (2004). Moreover, two of the cases cited by the CCA in that opinion (*Brewer v. State*, No. 71,307 (Tex. Crim. App. 1994) (unpublished)) are among those *Respondent* has previously cited to this Court as illustrations of how the CCA routinely foreclosed *Penry* claims unless they involved "continuing, long-term, or permanent" disabilities that were "sufficiently severe" and causally connected to the crime. *See* Brief of Respondent, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002) at 22-28 and accompanying notes (citing, *inter alia*, *Joiner v. State*, 825 S.W.2d 701 (Tex. Crim. App. 1992) and *Goss v. State*, 826 S.W.2d 162 (Tex. Crim. App. 1992)).

[2] Respondent cites several cases for its claim that the state court's reasoning is irrelevant under § 2254(d), but most of them do not support it. For example, *Saiz v. Ortiz*, 392 F.3d 1166, 1176 (10th Cir. 2004), notes that the Tenth Circuit has not followed the practice of looking solely to the state court's result "where the state court's explicit reasoning contravenes Supreme Court precedent." *Saiz*, 392 F.3d at 1176 (citation omitted); *see also, e.g.*, *Stevens v. Ortiz*, 465 F.3d 1229, 1235 (10th Cir. 2006) ("When we review a summary disposition by a state court, we focus on its result rather than any reasoning," citing *Saiz*; "[h]owever, when applying AEDPA to fully reasoned opinions . . . , this circuit has not focused solely on the result 'where the state court's explicit reasoning contravenes Supreme Court precedent' "). Similarly, *Wright v. Dept. of Corrections*, 278 F.3d 1245, 1255 (11th Cir. 2002), acknowledges that the Eleventh Circuit had previously held that a federal habeas court should consider whether a state court had "explicitly misapplied the controlling Supreme Court decision," because a state court's "failure . . . to set out its reasoning is not equivalent to the conspicuous misapplication of Supreme Court precedent." *Id.* at 1256 n.3 (citation omitted). *Long v. Humphrey*, 184 F.3d 758, 760-61 (8th Cir. 1999), specifically identifies the reasons the state court gave for its challenged action in that case, *see id.* at 761, and in this regard is consistent with subsequent Eighth Circuit cases considering the state court's reasoning as part of the § 2254(d) analysis. *See, e.g.*, *Huss v. Graves*, 252 F.3d 952, 955-56 (8th Cir. 2001) (finding that the state court decision was unreasonable because it "applied the incorrect legal

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for upholding the Fifth Circuit's judgment endorsing Mr. Brewer's death sentence, then, reduces to his weak attacks on Mr. Brewer's evidence and the other circumstances we have identified as relevant to the inquiry under *Boyde v. California*, 494 U.S. 370 (1990). It is to those matters that we now turn.

B. Respondent's assertions about Mr. Brewer's history of physical and emotional abuse as an adolescent either ignore or distort the record.

Respondent contends that the Fifth Circuit was correct in holding that Mr. Brewer's evidence of a troubled childhood "was within the purview of future dangerousness especially where, as here, the possibility of rehabilitation was highlighted by the defense." RB 21. For this proposition, Respondent cites the Fifth Circuit's opinion rather than the trial record. It's easy to see why. Nowhere during

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standard to [the petitioner's] case," by relying on particular language in one Supreme Court opinion "to the exclusion of other relevant considerations"). Similarly, Respondent's citation to *Matteo v. Superintendent*, 171 F.3d 877, 891 (3rd Cir. 1999), for this proposition is undermined by later Third Circuit cases assessing a state court's reasoning as part of the § 2254(d) analysis. *See, e.g., Bronshtein v. Horn*, 404 F.3d 700, 723-24 (3rd Cir. 2005) (finding state court to have unreasonably applied *Batson*, based on the state court's reasoning "that the record suggested legitimate reasons that could have motivated the prosecutor to exercise the contested peremptory challenge"). These opinions make plain that no such consensus exists among the Circuits that in applying § 2254(d), a federal court must ignore the state court's reasoning. Any such approach, moreover, would appear to be out of step with this Court's observation that the focus under § 2254(d) should be on whether "*the reasoning []or the result* of the state-court decision contradicts" Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 7-8 (2002) (*per curiam*) (emphasis added); *see also, e.g., Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) (examining the Virginia Supreme Court's reasoning, and not simply its result, on the way to determining that its rejection of Williams' ineffective-assistance claim was objectively unreasonable).

their penalty-phase closing arguments did either of Mr. Brewer's lawyers claim that any aspect of his character or background improved his prospects for rehabilitation. "Rehabilitation" appeared only when defense counsel told the jurors they should regard rehabilitation as a more worthy goal of punishment than retribution. *See* JA 102, 107 (contrasting "eye for an eye" retribution with "deterrence and rehabilitation").[3]

Respondent places great weight on the claim that Mr. Brewer "could not have been physically abused at all until after the age of fifteen," and urges that the testimony indicates that he "experienced a reasonably idyllic childhood" prior to that age. RB 31. These attempts to minimize the trauma Mr. Brewer experienced as a child fail for several reasons. First, there was evidence that Mr. Brewer's childhood relationship with his stepfather Don was not "idyllic," even if it did not involve physical mistreatment. Mr. Brewer's mother Karon acknowledged that Don treated Mr. Brewer "really well" immediately after she married him, but "after

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[3] The penalty-phase closing arguments for the defense touched on a range of topics. *Inter alia*, defense counsel argued that the killing wasn't deliberate because it was "a robbery [that] went awry," JA 103 and 108-10; that Mr. Brewer's prior bad acts did not prove his future dangerousness beyond a reasonable doubt, JA 104-05 and 111-12; that imprisoning Mr. Brewer would protect him from the bad influence of others, including his father who "hurt him and beat him and influence[d] him," JA 105-06; that Dr. Coons' hypothetical testimony predicting Mr. Brewer would be dangerous was unreliable, JA 106-07 and 110-11; that Mr. Brewer, if spared, would have to serve fifteen years in prison before becoming parole-eligible, JA 112; and that counsel appreciated the importance of the jurors' duty and the difficulty of their task, JA 102, 108, 113. But defense counsel never once argued – *could* not argue, consistent with common sense – that Mr. Brewer's history of abuse and hospitalization for depression supported a "no" answer to the future dangerousness question.

he and I had a child, . . . he ignored Brent, just like he wasn't there." JA 65; *see also* JA 53. Don treated his own daughter conspicuously better than he treated young Mr. Brewer, and Mr. Brewer felt pain from that neglect. *Id.* at 66. Equally troubling, Mr. Brewer was smoking marijuana by the time he was in junior high school. *Id.* While Mr. Brewer may not have been a target of savage physical abuse prior to age fifteen, he was neglected by his stepfather and was using drugs at an age when he was especially vulnerable to their destructive long-term effects, neither of which supports describing his childhood as "idyllic."

More important, Respondent's emphasis on "the lone documented physical confrontation between [Mr.] Brewer and his father" during Mr. Brewer's teenage years, RB 32, ignores not only the testimony about the violent mistreatment of Mr. Brewer at his father's hands, but also the undisputed testimony that the relationship between Mr. Brewer's parents was pervasively violent and that Mr. Brewer himself was routinely exposed to violence in the home when he was an adolescent. Remarkably, Respondent calls it "a stretch" to characterize the physical abuse of Mr. Brewer by his father as "extensive," because the record reveals "only three instances" of physical abuse leaving "no serious injuries." RB 32 n.10. In fact, the record reflects "only three instances" where Mr. Brewer was "*hit with objects*." *See* JA 65 (emphasis added). On those three separate occasions, Mr. Brewer's father assaulted him with "the butt of a pistol," "a flashlight," and "a stick of firewood." *Id.* Before she was asked about her husband's hitting Mr. Brewer with objects, however, Mrs. Brewer was asked whether she had ever seen her husband "beat on Brent." *Id.* She replied, "Yes, he has hit Brent *numerous times*." *Id.* (emphasis added). A reasonable

juror would not fail to understand that the beatings were frequent, even if the weapon-wielding assaults were not.[4]

Moreover, undisputed testimony described the relationship between Mr. Brewer's parents as fraught with open violence. His father's outbursts involved yelling, throwing things, and "beat[ing] on" Mr. Brewer's mother. JA 65, 51-52; *see also* JA 61 (testimony of Mr. Brewer's father that "at times" he "beat [his] wife real bad," including "throwing chairs [at her] in a rage"). These incidents were probably fueled by the fact that Mr. Brewer's father was drinking heavily during this period. JA 48-49; *see also* JA 47 (Mr. Brewer's father "used to buy half a gallon of vodka and drink it out of the bottle"). Mr. Brewer saw these attacks. JA 64. Sometimes the assaults produced "swollen eyes" and "broken noses." *Id.* at 62. Mr. Brewer's father described how events would unfold:

> Q: When you and Karon got back together, how would you describe your relationship . . . ?
>
> A: Well, good – you know, when it's good, it's good. But I've got a lot of problems, and when I was violent or things didn't go my way, I get violent, you know.

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[4] Respondent's argument raises an interesting question: how many times would a parent have to assault a child with a blunt instrument, as Mr. Brewer's father did three times here, before Respondent would agree that the abuse qualified as "extensive?" Most of us, thankfully, have never been hit by our parents with a flashlight, or the butt of a pistol, even once. In light of Mrs. Brewer's testimony that Mr. Brewer's father hit him "numerous times," a reasonable juror would be richly entitled to infer that these three incidents represented just the tip of the iceberg. *See, e.g.*, Brief of *Amici Curiae* The American Academy of Child and Adolescent Psychiatry, *et al.*, at 5 n.4 ("one major study" found that "81% of maltreated child and adolescent subjects reported that they experienced more than one type of maltreatment").

Q: Did you beat Karon up?

A: Yes, sir.

Q: Did she have to call the police on you sometimes?

A: Yes, sir.

Q: Was Brent around when that happened?

A: Yes, sir.

Q Did you and Brent have fights about that?

A: Yes, sir. Well, it wasn't me and Brent having fights. Me and her had fights, and he loved both of us, and he was drawn two different directions, and he got between. But then, I just got mad at him, too, you know, and that's what started it.

Q: Okay. Tell the jury what you told Brent when he would get between the two of you.

A: "If your [sic] ever draw your hand back, you'd better kill me, because I'll kill you."

JA 50. Thus, the home in which Mr. Brewer lived from age fifteen was painted vividly for the jury as a place where his father regularly flew into a drunken rage, "beat up" his mother and threatened to kill Mr. Brewer.

Exposure to domestic violence psychologically disfigures and emotionally damages children. As former Attorney General John Ashcroft has cautioned,

> [W]hen families are wracked by violence and abuse, values are corrupted. The messages transmitted by parents are messages of violence, cruelty, and powerlessness. . . . Domestic violence damages children. Thousands of children have

> been scarred by violence in their homes. Sometimes they are terrified witnesses of abuse; and sometimes they are the victims. But always, these children absorb messages of violence.

See Brief of *Amici Curiae* Child Welfare League of America, *et al.*, at 4 (citing remarks of Attorney General Ashcroft at the Annual Symposium on Domestic Violence in October 2002). Respondent's efforts to deny the significance of this evidence are also at odds with statements in a study of domestic violence awareness sponsored by *Respondent's own counsel*, the Office of the Texas Attorney General, which states without qualification that "Children who grow up with domestic violence are much more likely to perpetrate violence." Executive Summary, *Prevalence, Perceptions, and Awareness of Domestic Violence in Texas* (as revised, May 2003) at 6 (available at http://www.oag.state.tx.us/newspubs/releases/2004/pac_exec_summary.pdf).

Although Respondent gamely tries to downplay these disturbing facts about Mr. Brewer's background as "hardship" that was "experienced . . . only briefly," a reasonable juror would find it significant that Mr. Brewer was regularly exposed to serious domestic violence over a period of several years; that he was hit by his father "numerous" times, including three times with weapons; and that his father regularly threatened to kill him.[5]

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[5] A few words are also necessary to ensure a fair characterization of the 1989 incident in which Mr. Brewer and his father fought, with Mr. Brewer injuring his father seriously enough that he had to be hospitalized. *See* JA 51-52, 22-31 (describing this event and its aftermath). First, there is absolutely no evidence for Respondent's bold claim that "by this time in his life," Mr. Brewer "was routinely the aggressor" in the conflicts with his father. *See* RB 32. Respondent cites to JA 65, but that page – like the rest of the record –provides nothing whatsoever

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C. Reasonable jurors would have regarded Mr. Brewer's hospitalization for depression shortly before the murder as evidence of a substantial mental impairment.

With respect to the evidence that Mr. Brewer was hospitalized for an episode of depression shortly before the murder, Respondent accuses Mr. Brewer of "irresponsible exaggeration" for characterizing his condition as a "mental impairment." RB 35. While it is true that the defense presented no expert testimony at trial to elaborate on the details of Mr. Brewer's depression, the jury heard that Mr. Brewer was hospitalized after writing a suicide note to his family, *see* JA 39; that he was examined by a physician for mental illness before being committed, *see* JA 35, 37; that the judge who signed the commitment order heard testimony from a "social worker" that led her to believe that Mr. Brewer "could be a threat to himself because of the suicide [note]," JA 39; and that upon his admission he was diagnosed as suffering from depression. DX 5. Given the widespread popular appreciation that depression can be a debilitating disorder, this was certainly sufficient evidence to persuade a reasonable juror that Mr. Brewer was, just a

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to support this claim. Second, Mr. Brewer's father acknowledged that the 1989 fight began when Mr. Brewer intervened to protect his mother from yet another beating by his father. *See* JA 52, 59. Finally, there was testimony that the knowledge of how gravely he had injured his father "tore [Mr. Brewer] up mentally." JA 59; *see also* JA 56 (Mr. Brewer had "tears in his eyes" immediately after the fight), JA 60 (Mr. Brewer "apologized over and over" for hurting his father). Like many families beset by turmoil and violence, the Brewers apparently loved one another even as they nearly killed one another. JA 54. This is hardly a one-dimensional story of "aggressive behavior" by Mr. Brewer that "culminated in murder," *see* RB 32, but instead a gripping portrayal of a complex tragedy that led to the ruin of several lives, both inside the Brewer household and out.

few weeks before the murder, exhibiting a substantial "mental impairment."

Equally shaky is Respondent's claim that the evidence showed that Mr. Brewer had been successfully treated for the depression that led him to threaten suicide a few weeks before the murder. *See* RB 36-37. While it is true that Mr. Brewer's mother testified that at about the time of his release, Mr. Brewer expressed a hope that he could stay off drugs and turn his life around, JA 71, there is no warrant for Respondent's wild inferential leap that "[a] juror applying commonsense to this evidence would clearly understand that [Mr.] Brewer's depression was connected to his drug abuse and that he would not be exposed to such negative influences if imprisoned for life." RB 37 (footnote omitted). It is just as likely that Mr. Brewer's use of drugs was a *consequence* of his depression, rather than a cause, and that he found himself unable to avoid such self-medication after he was out of the hospital precisely because his depression had not permanently abated.

In any event, Respondent's claim that there was no evidence "other than the crime itself" that Mr. Brewer was still suffering from mental problems after his release, RB 35, is reminiscent of the old joke about Ms. Lincoln at Ford's Theatre ("Other than that, Ms. Lincoln, how did you like the play?"). It is precisely because the murder took place such a short time after Mr. Brewer's mental problems were objectively identified as serious enough to warrant hospitalization that a reasonable juror might well have linked the two events, concluding both that Mr. Brewer remained impaired (notwithstanding his release from treatment) and that his continuing impairment made him an acute danger to others. This inference is especially strong given the enduring popular misperception that mental disorder predisposes many of those suffering from

it to violent behavior. *See* PB 28-29 n.16 (citing numerous authorities).[6]

Respondent continues to dispute the circumstances of Mr. Brewer's original commitment for treatment. *See* RB 36. The record on this point is clear. As made plain by the testimony of the judge who signed the commitment order, Mr. Brewer was originally *involuntarily* committed for treatment after writing a suicide note to his family. *See* JA 34 (identifying the initial commitment as one made "against his [*i.e.*, Mr. Brewer's] will"). Seventy-two hours later, at a probable cause hearing, the judge heard testimony from hospital staff that Mr. Brewer "did need to have further hospitalization at the Big Spring State Hospital." JA 35. After that probable cause hearing, Mr. Brewer ultimately "signed a request for voluntary admission." *Id.* The jury was aware that the initial commitment was involuntary and was triggered by Mr. Brewer's suicide note, and that he subsequently agreed to submit himself to continued hospitalization.

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[6] We have already explained, *see* PB 29-30, that the purported "treatability" of a defendant's mental impairment is not a legitimate basis for denying relief under *Penry*. That said, Respondent clearly errs in claiming that the Fifth Circuit's recent *en banc* decision in *Nelson v. Quarterman*, ___ F.3d ___, 2006 WL 3592953 (5th Cir. Dec. 11, 2006) (*en banc*), endorses the "non-treatability" condition for *Penry* relief. *See* RB 37-38 (attempting to distinguish *Brewer* from *Nelson* on the ground that in *Nelson* there was "conflicting expert testimony concerning whether [Nelson's condition] was treatable"). The *en banc* majority in *Nelson* does not follow the Fifth Circuit's prior "bright line" approach under which any conceivably treatable mental disorder was *ipso facto* outside *Penry*'s scope. *Id.* at *25. *Nelson* focuses instead on whether the relevant mitigating qualities of the defendant's particular condition are within the jury's effective reach by tending to support a "no" answer to the "future dangerousness" question. *See Nelson* at *21. Respondent's assertion that *Nelson* did not overrule prior misguided Fifth Circuit authority on this point, *see* RB 39, is difficult to square not just with the majority opinion in *Nelson*, but also with the dissenting opinions, which clearly understand the majority to have turned onto a new path.

D. The specific circumstances of this case, including the voir dire questioning of the jurors and the penalty-phase closing arguments of counsel, compel the conclusion that jurors lacked a vehicle for giving meaningful consideration to the relevant mitigating qualities of Mr. Brewer's evidence.

Two final aspects of Respondent's brief deserve comment. First, Respondent asserts that both the physical abuse Mr. Brewer suffered as an adolescent and the mental problems he was suffering shortly before the crime could have persuaded a reasonable juror to answer the "future dangerousness" question "no." *See* RB 33 (the evidence that Mr. Brewer was beaten and mistreated by his father was "certainly not *aggravating* within the scope of the future-dangerousness issue," and "without a doubt, [is] within the scope of future dangerousness when viewed objectively") (emphasis in original); RB 36 ("treatable mental problems can be given sufficient mitigating effect in answering the future-dangerousness inquiry"). Yet, Respondent does not even attempt to explain what sensible chain of reasoning might get a juror from those premises ("Mr. Brewer suffered serious physical and emotional mistreatment from his father as a teenager"; "Mr. Brewer was hospitalized for depression and suicidal ideation shortly before the crime") to the desired conclusion ("Therefore, Mr. Brewer is less likely to be dangerous in the future"). And the reason for Respondent's omission is that no such common-sense link exists. *See* PB 12-15.[7] Circumstances like these are offered in mitigation to

[7] *Amici* agree that "there is nothing about [a history of child abuse] that categorically demonstrates that the defendant is less likely to be dangerous in the future." Brief of *Amici Curiae* The American Academy of Child and Adolescent Psychiatry, *et al.*, at 25. Moreover, extensive evidence from popular culture suggests that jurors widely hold the notion that

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explain, not *rebut*, a defendant's violent past conduct and likely future dangerousness. Trial counsel could not offer any theory of how the relevant mitigating qualities of Mr. Brewer's abused background or mental impairment made him less dangerous. At least in the specific circumstances of this case – where the jurors were emphatically and repeatedly discouraged during voir dire from viewing the special issues as permitting a broad assessment of Mr. Brewer's moral culpability or the appropriate sentence in light of all the evidence – *some* explanation of *some* rational path of reasoning from the relevant mitigating qualities of the defendant's evidence to a conclusion of non-dangerousness is essential to a finding that that evidence was within the jurors' effective reach under the "future dangerousness" issue. Neither Respondent, the Fifth Circuit, nor the Court of Criminal Appeals has been able to provide one.

Finally, it is necessary to rebut Respondent's astonishing assertion that "the prosecutor did not ask the jury to consider [Mr.] Brewer's mitigating evidence as aggravating." RB 40. In memorably colorful and direct prose, the prosecutor did *exactly* that:

> And, you know, folks, you can take a puppy, and you can beat that puppy and you can make him mean, but if that dog bites, he is going to bite the rest of his life, for whatever reason. *Whatever got him to this point, he is what he is today. And that will never change. That will never change.*

JA 118 (emphasis added). Respondent does not even acknowledge this argument, much less try to deny its

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"childhood abuse and trauma are often catalysts for adult acts of violence." Brief of *Amici Curiae* Child Welfare League of America, *et al.*, at 19-24.

aggravating force. The import of the prosecutor's remarks – that the "beatings" he endured as a "puppy" made Mr. Brewer "what he is today," *i.e.*, a "dog" who will "bite the rest of his life [and] never change" – is precisely the same as the Court confronted in *Tennard*. *See Tennard*, 542 U.S. at 289 (jurors might have given Tennard's low IQ evidence aggravating effect under the future dangerousness issue in part "because the prosecutor told them to do so" by arguing that Tennard's low IQ was "really not the issue" and that the focus of the question was "the fact that he is a danger," rather than "the reasons why he became a danger"). Both here and in *Tennard* the prosecutor "pressed exactly the most problematic interpretation of the special issues" when he ruled out consideration of "whatever got [Mr. Brewer] to this point" and directed the jurors to focus instead on "what he is today." *Id.*[8]

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[8] This effect was only heightened by the fact that the prosecutor during voir dire had repeatedly reinforced the narrowness of the inquiries under the special issues. *See* PB 15-18 (describing prosecutor's questions in detail). Respondent suggests that this Court's opinion in *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*") discounts the importance of voir dire questioning in assessing jurors' likely understanding of their penalty-phase instructions, because of the passage of time between the two. *See* RB 42 n.18 (citing *Penry II*, 532 U.S. at 801). We think Respondent misreads *Penry II* on this point, but in any event the problem was exacerbated here by the fact that the prosecutor specifically *reminded* the jurors in closing argument that trying to take a broader view of the special issues would deny both parties "a fair trial" – the precise language in which he had couched the same warnings during voir dire. *See* PB 19-20. On this record, the voir dire questioning in combination with the prosecutor's closing argument amply supports a finding that the jurors did not understand themselves to be entitled to express in their answers to the "special issues" any broad conclusion about the appropriate sentence in light of all the evidence.

CONCLUSION

The Fifth Circuit wrongly reversed the District Court's thoughtful opinion granting Mr. Brewer relief. Neither the Court of Appeals' opinion or the CCA's can be reconciled with *Tennard*. The relevant mitigating qualities of Mr. Brewer's abused childhood and mental impairment as a young adult bore no relationship to either of the two pre-1991 Texas special issues that were submitted to the jury as the sole determiners of his sentence. Moreover, the prosecutor exploited the facial narrowness of those questions by insisting that Mr. Brewer's jurors answer them solely on the basis of the evidence, without regard to their consequences for the appropriate sentence. Under these circumstances, the CCA applied *Penry* in an objectively unreasonable manner in denying relief. This Court should reverse the Fifth Circuit and instruct it to reinstate the judgment of the District Court granting habeas corpus relief.

Respectfully submitted,

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